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No. 87-49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

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REPLY BRIEF

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1. Respondents misread a crucial provision in Section 43 of the Airline Deregulation Act of 1978 that is highly relevant to the constitutional question presented. Respondents claim that the statute does not impose the duty to hire a "protected employee" exclusively on air carriers with no previous relationship to the protected employee. Respondents are 100 percent wrong. For, section 43(d) expressly limits the hiring duty, providing only that a protected employee furloughed by an air carrier "shall have first right of hire . . . by any *other* air carrier . . . ." 49 U.S.C. app. § 1552(d)(1) (1982) (emphasis added). The next sentence refers back to the description "by any *other* air carrier:"

> Each *such* air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier *may* recall any of its own furloughed employees before hiring such a person.

49 U.S.C. app. § 1552(d)(1) (1982) (emphasis added).

2. If Congress had intended to impose on the air carrier that furloughed the protected employee a statutory duty to rehire such former employee, it would have said so by omitting the word "other." It would not have expressly limited the hiring right to "any *other* air carrier." Further, under respondents' construction, the exception clause quoted above is inconsistent with the carriers' obligation. Congress would not have granted permissive authority to an air carrier to recall its own furloughed protected employees—"such air carrier *may* recall any of its own furloughed employees"—if the carrier had a statutory duty to rehire such employees.

3. As a practical matter, the hiring burden falls on air carriers which, having no employees of their own to recall, are obligated to hire the protected former employees of their competitors. Through its distorted construction of the statute, however, respondents strain to create some nexus between the burden imposed on a particular air carrier and the benefit bestowed on a "protected employee." Respondents apparently believe that this strained interpretation is important to their position because in the cases they cite, this Court has found such a nexus essential, *see e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19-20 (1976) (due process clause does not bar requiring an operator to compensate for a former employee's death or disability arising out of his employment in the operator's mines). The statutory language, however, provides no connection whatsoever between the statutory burden imposed on a particular air carrier and any obligation it may have to its former

employees. Moreover, contrary to the rationale of *Turner Elkhorn* upon which they rely, even respondents do not dispute that Section 43 imposes on carriers a duty to hire employees with whom they have had no prior relationship.

4. Respondents also dispute petitioners' contention that the hiring provisions require air carriers to hire "less qualified and able" employees, arguing that job applicants must meet "standard qualifications set by the carriers" and carriers may choose among protected employees. *See* Opposition Brief of Secretary of Labor at 6 n.5. But all qualified applicants are not equally qualified. Lawyers who have graduated from law school and passed the bar may be considered qualified by these facts alone for a position on the General Counsel's staff, but clearly some applicants are more qualified than others. Similarly, although many pilot applicants may be qualified, some candidates obviously will make better pilots than others. Where two applicants are qualified and only one is "protected," respondents would require the airline to hire the "protected employee." But the ability to select the best applicant is essential in an industry in which reducing pilot error to an absolute minimum is a matter of increasing emphasis. *See* 49 U.S.C. app. § 1421(b) (carriers' obligation to achieve "the highest possible degree of safety").

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